APPEAL NO. 042230
FILED NOVEMBER 1, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 5, 2004. With regard to the disputed issues the hearing officer determined that: (1) the date of maximum medical improvement (MMI) is May 28, 2002; (2) the respondent's (claimant) impairment rating (IR) is 19%; (3) the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in appointing a second designated doctor; (4) the claimant had disability from November 1, 2000, through May 28, 2002; and (5) that the appellant (carrier) is not entitled to contribution due to an earlier (1996) injury.

The carrier appeals, contending that: (1) the IR of Dr. C, the first designated doctor, reflected all compensable body parts and was rendered prior to statutory MMI (*See* Section 401.011(30)(B)); (2) the Commission abused its discretion in appointing a second designated doctor; (3) the correct IR is 13% with an MMI date of October 31, 2000 (pursuant to Dr. C's third report); (4) the claimant was not entitled to temporary income benefits (TIBs) (did not have disability) after October 31, 2000; and (5) the carrier is entitled to contribution for the 1996 compensable injury. The file does not contain a response from the claimant.

DECISION

Affirmed in part, and reversed and remanded in part.

The parties stipulated that on (date of injury No. 1), the claimant sustained a compensable injury to his lumbar and cervical spine; that on (date of injury No. 2), the claimant sustained another compensable injury to his lumbar and cervical spine; that Dr. C was the first Commission-appointed designated doctor; that Dr. Y was the second Commission-appointed designated doctor; and that the claimant's statutory date of MMI was May 28, 2002. It is also undisputed that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) was the proper edition of the AMA Guides to be used.

WHETHER DR. C'S RATINGS WERE PROPER

Dr. C rendered his first rating in a Report of Medical Evaluation (TWCC-69) and narrative report dated October 31, 2000, where he certified MMI on that date with an 8% IR based on 0% impairment "due to abnormal motion of the cervical spine," 3% impairment for lumbar loss of range of motion (ROM), and 5% impairment from Table 49, for "lumbar IVD/soft tissue lesion." There were letters of clarification and responses clarifying that Dr. C included an assessment of the cervical spine which the carrier had accepted. For some reason (unclear to everyone) the claimant was sent back to Dr. C

for a second examination. On a TWCC-69 dated September 25, 2001, and narrative, Dr. C again certified MMI on October 31, 2000, with a 16% IR based on a 6% impairment (apparently) for lumbar loss of ROM, 2% impairment for cervical loss of ROM, 4% cervical impairment from Table 49 (apparently) Section (II)(B) and 6% lumbar impairment from Table 49 (apparently) Section (II)(B) combined for a 16% IR. Subsequently, a doctor recommended lumbar spinal surgery which led to another request for clarification and a third evaluation by Dr. C. In a "Corrected Report" dated January 31, 2002, Dr. C certified MMI on October 31, 2000, with a 13% IR based on a combination of cervical and lumbar loss of ROM and values from Table 49. By stipulation the statutory date of MMI is May 28, 2002. The claimant had two level spinal surgery at L4-5 and L5-S1 on February 25, 2003. Records regarding the surgery were sent to Dr. C and in a letter dated July 8, 2003, stated that he would have to reexamine the claimant again and "it does appear that the date of MMI should be changed." A Dispute Resolution Information System note of July 15, 2003, notes that Dr. C "states [that] MMI does need to be revised."

None of Dr. C's reports may be used because the initial MMI dates certified by Dr. C have been withdrawn in his July 8, 2003, letter and the great weight and preponderance of the medical evidence supports that the claimant was not at MMI on October 31, 2000. It is axiomatic that an IR cannot be assessed until the MMI date has been established. At no time does Dr. C accept or certify the statutory MMI date. While Dr. C may have included all the compensable body parts in his ratings, his MMI date is not supported by the evidence and was even withdrawn in subsequent correspondence.

ABUSE OF DISCRETION IN THE APPOINTMENT OF A SECOND DESIGNATED DOCTOR

Dr. C indicated that he wanted to examine the claimant in July 2003 and the claimant was scheduled for an examination. The claimant was unable to attend that examination because he was incarcerated toward the end of July 2003. Upon being released from incarceration the claimant attempted to reschedule the reexamination with Dr. C but by that time Dr. C was no longer on the Commission approved doctor list (ADL). As a consequence Dr. Y was appointed as the designated doctor to perform a post surgical evaluation of the claimant. In a TWCC-69 and report dated February 12, 2004, Dr. Y certified MMI on May 28, 2002, and assessed a 19% IR based on 5% impairment for cervical loss of ROM, 0% impairment for lumbar loss of ROM (invalidated measurements), 4% cervical impairment from Table 49 (II)(B) and 11% impairment from Table 49 (II)(E) and (F) for a surgically treated lumbar spine.

Although Dr. C responded to the requests for clarification and was cooperative, his certified MMI date was in fact withdrawn by him. Before Dr. C could certify another MMI date he was dropped from the ADL. In order to have the claimant examined by a designated doctor, a second designated doctor was appointed. *See* Section 408.122(c) and 408.125(e). The Commission did not abuse its discretion in the appointment of a second designated doctor. We affirm the hearing officer's determination on this issue.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that an assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date. The hearing officer, in the Background Information portion of his decision seems to analyze the case on the basis that spinal surgery was "not only contemplated prior to statutory MMI, but was delayed" due to the carrier's refusal to authorize diagnostic testing. In Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the Appeals Panel referred to the preamble to Rule 130.1(c)(3) in noting that if the MMI date is changed due to a post MMI change in the injured employee's conditions, there should be a reevaluation of the IR as of the new MMI date. Rule 130.1(c)(3) has been interpreted to mean that the IR shall be based on the condition as of the MMI date and not based on subsequent changes, including surgery. *See also* Texas Workers' Compensation Commission Appeal No. 040583, decided May 3, 2004. Rule 130.1(c)(3) does not contain any exceptions for cases where the carrier denies or delays diagnostic testing. There is no evidence that statutory MMI was extended pursuant to Section 408.104. Cases involving whether spinal surgery was under active consideration at the time of statutory MMI have been overcome by the provision of Rule 130.1(c)(3). We reverse the hearing officer's determination that the claimant's IR is 19% because very clearly Dr. Y considered, and included in his evaluation, the claimant's post statutory MMI surgery. We remand for the claimant to be evaluated and rated at the time of MMI, which in this case is the statutory MMI date of May 28, 2002.

DISABILITY

Disability is defined in Section 401.011(16). The medical records and the claimant's testimony clearly support the hearing officer's determination on disability to May 28, 2002.

CONTRIBUTION

Section 408.084(a) provides that the Commission may order impairment income benefits and supplemental income benefits to be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. Section 408.084(b) provides for the consideration of the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section. As stipulated, the claimant had a prior compensable injury to his cervical and lumbar spine in 1996. The claimant has received a 5% IR for that injury based in Table 49 (II)(B) (a minimum of six months of medically documented pain). The hearing officer commented, and found, that the 1996 injury was only a lumbar sprain/strain which had resolved. The carrier contends that to receive an IR the impairment must be a permanent impairment. *See* Section 401.011(24). Although the hearing officer does not use the term cumulative impact he does discuss that the claimant had returned to work at heavy labor after his 1996 injury and that the claimant's "current injury obviously involved much more than a lumbar/sprain." We affirm the hearing officer's determination on the contribution issue as being supported by the evidence.

We affirm the hearing officer's determinations that the claimant's date of MMI is May 28, 2002; that the Commission did not abuse its discretion in the appointment of a second designated doctor; that the claimant had disability for the dates found by the hearing officer; and that the carrier is not entitled to contribution from the 1996 injury. We reverse the hearing officer's determination that the claimant's IR is 19% as being contrary to Rule 130.1(c)(3) and remand the case for the claimant to be examined and evaluated for an IR as of the May 28, 2002, MMI date.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

CONCURRING OPINION:

I concur with the majority opinion as I believe we are constrained by the operation of Rule 130.1(c)(3) to reach this result. I write separately to observe that I think this case illustrates one of the huge problems with applying Rule 130.1(c)(3). In the present case the finder of fact clearly believed that the claimant's surgery was under consideration prior to the date of statutory MMI, but that the surgery was delayed due to the actions of the carrier until well after the date of statutory MMI. There is evidence in this record to support this belief. However, due to the operation of Rule 130.1(c)(3) the surgery cannot be taken into account in assessing the claimant's MMI. Thus, the claimant may well end with a lower rating because the carrier delayed the claimant's surgery. This appears to me to be unfair on its face and opens up the system to possible gamesmanship. However, since there is no exception in Rule 130.1(c)(3) which addresses this problem, there is certainly nothing the Appeals Panel can do, other than to point out the problem.

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Gary L. Kilgore
Appeals Judge